

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





77-1171

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

\_\_\_\_\_  
No. 77-1171  
\_\_\_\_\_

UNITED STATES OF AMERICA,  
Paintiff-Appellee,  
vs.  
CODELL GRIFFIN,  
Defendant-Appellant.

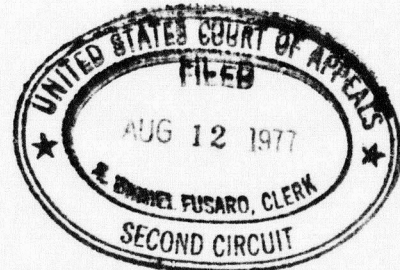
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Appeal from the United States  
District Court for the  
Southern District of New York

The Honorable Whitman Knapp, District Judge

REPLY BRIEF FOR APPELLANT

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### INTRODUCTION

This Reply Brief is intended to give the Court additional assistance on the arguments raised by Appellant GRIFFIN. Appellant restates and reaffirms that Issues for Review, Statement of the Case and Statement of Facts contained in his Opening Brief.



## ARGUMENT

### I

THE CONDUCT OF THE GOVERNMENT IN DIRECTING INFORMANTS TO INCRIMINATE THE APPELLANT FOR A FEE IS OUTRAGEOUS ENOUGH TO REQUIRE THE EXCLUSION OF THEIR TESTIMONY, AND IS SUFFICIENT TO VIOLATE DUE PROCESS OF LAW AND TO BAR THE CONVICTION.

The Appellee first contends that the failure to raise this issue at trial prevents the Court of Appeals from considering it (Appellee Br. at 15-16). This contention is frivolous and the cases advanced by the Appellee do not stand for this proposition. United States v. Wright 466 F2d 1256 (2d Cir. 1972), United States v. Projansky 465 F2d 123 (2d Cir. 1972) and United States v. Indviglio 352 F2d 276 (2d Cir. 1965) are not even concerned with informants. United States v. Bishop 367 F2d 806 (2d Cir. 1966) held that the failure to advance an entrapment defense at trial prevented the Court of Appeals from hearing an Argument that the entrapment instructions were erroneous. United States v. Neal 536 F2d 533 (2d Cir. 1976) did not discuss the failure to raise this due process argument at trial. The holding in Neal was that Williamson v. United States 311 F2d 441 (5th Cir. 1962) was inapplicable because the facts were dissimilar.

The case that settles this argument against the Government, which the Appellee has conveniently ignored, is United States v. Cuomo 479 F2d 688 (2d Cir. 1973). There, the Appellant contended that it was improper for the Government to hire an informer to implicate people for money. The Court recognized that this was different from an entrapment defense in that it focuses only upon the propriety of the Government's conduct and does not involve factual issues relating to

the predisposition of the Defendants to commit the crime. The Second Circuit concluded that it was not barred from hearing this claim.

The entrapment defense, ... must be raised at trial and submitted to the Jury. However, inasmuch as the constitutional argument raised in this case depends solely on a question of law, that is, whether the prosecution's conduct is so "shocking" as to constitute a violation of the Defendant's right to due process, we discuss it even though the issue was not raised in the first instance in the Court below. (Citations omitted) Cuomo, supra, at 691-692.

The Appellee has apparently been unable to grasp the substance of this portion of the appeal. It has never been the Appellant's position that the use of a paid informant, of itself, violates due process (Appellee Br. at 16). To the contrary, GRIFFIN asserts that the Government in the case at bar pursued an arrangement rejected by Williamson v. United States, supra, and that in doing so it violated his due process rights.

Williamson strongly disapproved of the Government policy of paying or promising to pay money to informers to make cases against specified individuals. Such an arrangement was held to create too great a risk that the informers would frame the suspect or induce innocent persons to commit crimes. In United States v. Neal, supra; United States v. Cuomo, supra; and United States v. Smalls 363 F2d 417 (2d Cir. 1966), Williamson was not followed by this Circuit for the reason that contingent fee arrangements there had not been shown to exist, but the Second Circuit has never rejected the holding of Williamson.

By claiming that the disapproved contingent fee arrangement did not exist in the case at bar (Appellee Br. at 16-17), the Appellee is



either ignoring the evidence or attempting to distort the facts to its own benefit. There can be no disputing either the fact that both JAMES BRYANT (KID) and WILLIAM CLARK (COUNTRY) were acting as informants at the behest of Government agents or that they were following specific instructions to buy drugs from CODELL GRIFFIN (T. 942, 393). It is also clear that their actions were in exchange for promises of compensation, either in money or immunity from prosecution, or both. COUNTRY had been promised Five Thousand (\$5,000.00) Dollar by AGENT BLACKBURN. COUNTRY went so far as to admit that he expected to be paid over and above what was owed him if the Defendants here were convicted (T. 896-897). KID became an informant in February, 1976 (T. 62), he received his first payment on February 13, 1976 and by September, 1976 he had been paid Three Thousand (\$3,000.00) Dollars (T. 375). AGENT BLACKBURN then agreed to pay KID an additional Three Thousand (\$3,000.00) Dollars for his testimony (T. 373).

Both COUNTRY and KID had been promised money, expected to receive money, and were paid money for following instructions to buy drugs from CODELL GRIFFIN and for their testimony at trial. They were paid while the case was being "developed" and they anticipated additional payments in the future. That the facts in the case at bar fall within that conduct criticized in Williamson, supra, is further shown by United States v. Onori 535 F2d 938 (5th Cir. 1976) where the Court was considering the application of the Williamson Doctrine to a Government informant and said:

Her testimony shows, however, that she expected to receive compensation after a case went down. This is clearly a way of describing a contingent

fee arrangement, and the government's assertion to the contrary is unconvincing. Onori, supra, at 942.

Under the facts and the cases cited above, both COUNTRY and KID should be found to have been acting pursuant to the contingent fee arrangement forbidden by Williamson.

Williamson alone is authority to bar the Appellant's convictions, but the Government's conduct is also grounds for reversal under another theory. The Supreme Court has held that there may be some cases "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction...." United States v. Russell 411 U. S. 423, 431-432 (1973). Five or more members of the Supreme Court presently adhere to this view. Hampton v. United States 425 U.S. 484, 491-500 (1976). Encouraging informants to frame a specified individual by promising them wealth and immunity from prosecution should be found to be sufficiently outrageous conduct under the above test to bar the instant convictions.

## II

THE APPELLANT WAS IMPROPERLY CONVICTED ON TWO COUNTS BECAUSE HIS PARTICIPATION IN THE SUBSTANTIVE OFFENSES WAS NOT PROVEN.

The Appellee concedes that CODELL GRIFFIN's convictions on Counts XI and XII were based upon his introductions of WILLIAM CLARK (COUNTRY) to THOMAS BOYKIN and KENNETH IVERY (Appellee Br. at 22). Appellant contends that his convictions upon those Counts were improper.



The Government's position is apparently that the dearth of evidence connecting Appellant to IVERY and BOYKIN, as well as the absence of proof linking any of the other co-conspirators to IVERY and BOYKIN, is immaterial since CODELL GRIFFIN can be found to have had narcotics dealings with unrelated third parties. The Appellee admits that there is no direct proof that CODELL GRIFFIN had a heroin relationship with BOYKIN and IVERY (Appellee Br. at 23), but asserts that GRIFFIN's dealings with WILLIE GRIFFIN, TIM and DICKY DIAMOND and others establishes that BOYKIN and IVERY were his employees (Appellee Br. at 22-24). This contention is patently absurd.

That the Appellant may have had heroin dealings with others cannot be said to create an inference that that was also his relationship with IVERY and BOYKIN in the absence of any proof to that effect, and the cases cited by the Appellee do not hold otherwise. In United States v. Grant 545 F2d 1309 (2d Cir. 1976), a raid of a social club uncovered narcotics in rooms not open to club members. The fact that the Defendant had held himself out as the Club Manager and had keys to the locked rooms was held to be sufficient evidence for the Jury to find that he had the necessary dominion and control over the drugs to establish constructive possession. The instant case is completely unlike Grant, supra, in that the issue of limited access to a controlled substance is not present. Neither is United States v. Manfredi 488 F2d 588 (2d Cir. 1976) even close to being on point. The Manfredi Court discussed whether there was sufficient evidence of his involvement in the conspiracy to warrant introduction of hearsay statements against him. When the Court found that such a showing had been made, the hearsay declara-

tions were held to establish that Manfredi was the heroin supplier. In the case at bar, there were no statements by co-conspirators suggesting either that Appellant was supplying heroin to IVERY or BOYKIN or that they were operating as part of a common scheme. To the contrary, the evidence was that BOYKIN obtained the heroin from an unknown figure somewhere across town (T. 739-740).

United States v. MacDougal-Pena 545 F2d 833 (2d Cir. 1976), United States v. Lubrano 529 F2d 633 (2d Cir. 1975) and United States v. Calabro 449 F2d 885 (2d Cir. 1971), are likewise factually distinguishable. In MacDougal-Pena, the evidence found sufficient to connect the Defendant to the interstate transportation of stolen goods was that: he and another lived below an apartment that was burglarized and remnants of the stolen goods were found in their apartment; the Defendant was present when another attempted to pass stolen securities, and the Defendant was present when another sold stolen coins. In Lubrano, the evidence held to be sufficient to support a finding that Lubrano supplied cocaine was that: an informant talked with Defendants Rizzo and Vitale and bought drugs from Vitale; that Vitale said he needed to obtain drugs and visited Lubrano; that Lubrano and Finn left together after being introduced by Rizzo and a few minutes later Finn had cocaine, and Finn and Lubrano entered an apartment and Finn exited without the marked money but with cocaine. There was no such evidence linking CODELL GRIFFIN to the drugs COUNTRY obtained from either BOYKIN or IVERY. In Calabro, the evidence found to be sufficient to support a drug distribution conviction was that: Defendant Pena was present at narcotics sales and distributions; he knew of



sales made when he was not present; he knew the identity of suppliers and the quality they could deliver; and he assured large deliveries and kept his promise on short notice; Defendant Calabro was present at many transactions and statements of co-conspirators labelled him as the supplier.

As the Court of Appeals recognized in United States v. MacDougal-Pena, supra, at 835, cases discussing whether the evidence was sufficient to support a conviction depend on their facts. The cases cited by the Government are not controlling here for the reason that they are factually dissimilar. The only evidence relating to Appellant's convictions on Counts XI and XII is his introductions of COUNTRY to IVERY and BOYKIN and the decisive cases continue to be United States v. Jones 308 F2d 26 (2d Cir. 1962) and United States v. Hysohion 448 F2d 343 (2d Cir. 1971), which the Appellee has again ignored. Both cases are concerned with "facilitators" who introduce buyers to sellers, and both hold that without more there is no "working relationship" and the evidence of constructive possession is insufficient.

The evidence relating to Count XI is that when COUNTRY asked CODELL GRIFFIN for drugs on June 29, 1976, the Appellant replied that he had none (T. 735). After being pressured for a supplier, the Appellant introduced COUNTRY to BOYKIN. When COUNTRY complained to him about BOYKIN's prices, the Appellant disclaimed any further interest (T. 737). COUNTRY paid the money to BOYKIN and BOYKIN provided the drugs.

The evidence relating to COUNT XII was that COUNTRY asked the Appellant for drugs on July 14, 1976 and was told he had none. After

being pressured for a supplier, the Appellant introduced COUNTRY to IVERY (T. 746). All discussions over price and delivery were between COUNTRY, IVERY and GIL. When COUNTRY later expressed his dissatisfaction to the Appellant, the informant was told that the matter was between himself, IVERY and GIL. COUNTRY later made a second purchase from IVERY and GILL on that same day without ever speaking to CODELL GRIFFIN.

According to United States v. Jones, supra, and United States v. Hysohion, supra, the evidence failed to show that Appellant was anything more than a facilitator who, having no drugs to sell himself, introduced COUNTRY to others believed to be selling drugs. GRIFFIN was not proven to have had a working relationship with IVERY or BOYKIN that enabled him to assure the delivery of drugs to COUNTRY. The Appellant was not shown to be the supplier of either IVERY or BOYKIN, he did not deliver the drugs, set the price, fix the place of deliver or otherwise control the sale. The evidence failed to establish GRIFFIN's possession or constructive possession of the drugs in question and the convictions on Counts XI and XII must be reversed.

### III

IT WAS REVERSIBLE ERROR TO ALLOW THE APPELLANT'S DISSIMILAR PRIOR CONVICTION INTO EVIDENCE AND TO PERMIT THE GOVERNMENT TO GO INTO THE DETAILS AND CIRCUMSTANCES OF THAT CRIME.

The Government has again materially misrepresented Appellant's position. Nowhere in his Opening Brief did Appellant state that the



prosecutor brought out testimony on the guilty plea or on the length of the sentence (Appellee Br. at 24-25). What Appellant did attack was the means used to establish the conviction. Although the Prosecutor had certified records of the conviction, he produced a City Police Officer and a City Chemist who testified in depth about the details of the crime.

The proper way to introduce evidence of a prior conviction is to produce the Judgment of Conviction signed by the Sentencing Judge or a transcript of the relevant proceedings. United States v. Vario 484 F2d 1052, 1054 (2d Cir. 1972). In United States v. Rosenwasser 550 F2d 806 (2d Cir. 1977), the issue was whether the denial of a Motion for Severance was error where a police officer had testified about the circumstances of a similar crime by a Co-defendant. The majority did not discuss the manner in which the conviction was established, but Judge Gurfein in his dissenting opinion found it to be erroneous. Since a record of conviction was available to establish the commission of the offense, there was said to be no need for oral testimony about the facts involved in the "other crime." Rosenwasser, supra, at 811.

It was also error to have allowed the testimony in question according to United States v. Smith 353 F2d 166 (4th Cir. 1965) and United States v. Tomaiolo 249 F2d 683 (2d Cir. 1957). While those cases were concerned with the impeachment of a Defendant who had testified they are also applicable here and the Government's argument to the contrary is unconvincing. As the 1971 conviction was introduced to show CODELL GRIFFIN's motive or intent in the case at bar (T. 1439), the records of that conviction would be the best evidence. As in Smith and Tomaiolo, it is clear that the evidence at trial greatly exceed the objective sought

and was intended to establish that the Appellant was predisposed to deal in drugs.

The cases cited by the Government on this particular point are inapplicable. United States v. Panebianco 543 F2d 447 (2d Cir. 1976) was not even concerned with prior convictions. The holding there was that since the defense had questioned a Government witness about framing a Defendant, it was proper for the Government to show that the frame-up was to prevent the Defendant from carrying out a threat to kill the witness. United States v. Rivera 513 F2d 519 (2d Cir. 1975) held that it was not error for the Government to show that a witness had recanted his Grand Jury testimony due to threats. It was the Prosecutor here who introduced an improper course of conduct and the Government cannot now be heard to argue that he was merely clearing up a "partial and distorted picture" created by defense counsel (Appellee Br. at 25). If the records of the 1971 conviction had been introduced, defense counsel would not have had to question Officer Boutineau to attempt to minimize the prejudice to the Appellant and these problems would not have arisen.

(A) THE EVIDENCE WAS INADMISSIBLE BECAUSE  
THE PREJUDICE OUTWEIGHED THE PROBATIVE  
VALUE.

Appellant not only contends that the means for establishing his prior conviction was erroneous, but also that it was prejudicial to introduce that evidence at all under Federal Rule of Evidence 403 and 404(b). Not only was he forced to relitigate a five (5) year old charge without knowing prior to trial that it would be an issue, but the



evidence was presented in such a light that he was accused of a crime of which he had not been convicted. Like United States v. Miller 500 F2d 751 (5th Cir. 1974) Rev'd on other grounds 425 U.S. 435 (1976), it was more prejudicial than probative to introduce a prior conviction having little relation to the pending charges. In admitting this evidence, the Trial Judge abused his discretion.

(B) THE EVIDENCE WAS INADMISSIBLE BECAUSE NONE OF THE EXCEPTIONS PERMITTING ITS ADMISSION INTO EVIDENCE WERE SUFFICIENTLY DISPUTED OR "AT ISSUE."

The question of when a prior conviction may be used as evidence in the prosecution for subsequent acts was most recently answered in United States v. Adderly 529 F2d 1178 (5th Cir. 1976). While the Government has accurately cited some of the language of that decision (Appellee Br. at 27), it has twisted that language out of context. The Adderly Court was concerned with the issue of whether "specific intent" must be an element of the offense charged for a prior offense to be admitted to establish intent. The Court concluded that even though conspiracy has no element of specific intent, it does require intent, so a prior conviction could be admissible. However, the Court went on to further define its ruling at 1181 where it said:

Whether there is a material issue as to this element of intent depends not on the statutory definition of the offense but on the circumstances of the case and on the nature of the defense. A defendant who admits committing an act but relies on innocence, mistake, or lack of knowledge to exculpate him has made an issue of intent. A defendant who denies participation in an act raises no discreet issue of intent and if the act be proven the intent will usually be inferred. (Citations omitted)

Intent admittedly was an element of the conspiracy charged here and a prior conviction could have been admissible to establish that



element if it satisfied the prerequisites for admission of prior misconduct: The prior offense must be similar, it must not be too remote in time, the exception to the general rule of exclusion for which the offense is admitted must be a material issue, or "at issue," there must be a substantial need for the evidence, and the probative value of the prior misconduct must outweigh its prejudicial effect. United States v. Adderly, supra, at 1180; United States v. Ring 413 F2d 1001 (6th Cir. 1975).

It cannot be said that a simple drug possession conviction is sufficiently related to the charges brought here to justify its admission. GRIFFIN never claimed that he participated in the events in question with an innocent state of mind. The Appellant pled not guilty and denied being involved in any conspiracy, and thus intent or motive were not sufficiently "at issue." Neither was there any special need for the introduction of the prior conviction. The Prosecutor himself admitted that intent, motive, or "propensity" was established by the evidence directly relating to the charges (T. 1440) (App. 36). Further, the evidence and the manner in which it was introduced was more prejudicial than it was probative. Argument III(A), supra.

There was evidence of two (2) separate conspiracies, Argument V, infra, and two (2) of the substantive convictions were not supported by the evidence, Argument I, supra, and it cannot be said beyond a reasonable doubt that the testimony about the prior conviction did not deny the Appellant a fair trial. Chapman v. California 386 U.S. 18 (1967). The evidence of the single conspiracy charged, of which this prior conviction was allegedly a part, was not so overwhelming to call



for the application of the harmless error rule. In fact, the conspiracy charged was not proven. Much of the evidence relating to the conspiracy was the uncorroborated testimony of informers or alleged co-conspirators that the jurors rejected. That the 1971 conviction did not contribute to CODELL GRIFFIN's convictions cannot be found beyond a reasonable doubt.

IV

IT WAS REVERSIBLE ERROR TO ADMIT EVIDENCE THAT THE APPELLANT WAS INVOLVED WITH DRUGS IN 1967 WHEN THE INDICTMENT CHARGED A CONSPIRACY BEGINNING IN 1971, AS A GREAT DEAL OF TIME HAD PASSED, NONE OF THE OTHER CONSPIRATORS NAMED IN THE INDICTMENT WERE INVOLVED PRIOR TO 1974, AND THERE WAS NO PROOF OF A SINGLE CONSPIRACY CONTINUING FROM 1967 TO THE DATE CHARGED IN THE INDICTMENT.

Appellant reasserts the arguments presented in his Opening Brief.

V

THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO ESTABLISH THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT.

Appellant contends that instead of the single mass conspiracy charged in the Indictment, the proofs at trial established two (2) or three (3) separate conspiracies, none of which was the conspiracy alleged in the Indictment.

To support his contention, CODELL GRIFFIN relies on the fact that IVERY and BOYKIN, who were alleged to be members of the single conspiracy charged, were shown to have had no connection with or ties to GRIFFIN or any of the other conspirators. The only evidence relating to both the Appellant and BOYKIN was that GRIFFIN introduced him to COUNTRY when the informant insisted on purchasing drugs which the Appellant did not have. COUNTRY discussed terms with BOYKIN not



Appellant, BOYKIN made the delivery. BOYKIN had to make a twenty-five (25) minute cab trip across town to obtain the drugs which suggests that GRIFFIN, who was somewhere in the surrounding neighborhood, was not the source. Once the introduction was made, GRIFFIN was no longer involved in the transaction in any manner. When COUNTRY had complained to GRIFFIN about BOYKIN's prices, the Appellant replied "it ain't my business, I am not taking your business" (T. 737-740). That would not be the attitude of BOYKIN's employer.

The single transaction with IVERY, who was not shown to have had any relationship with BOYKIN, is much the same. COUNTRY again insisted on buying drugs when GRIFFIN said he had none, and at COUNTRY's request GRIFFIN introduced the informant to IVERY. IVERY talked to GIL and then told COUNTRY the price and quantity available. GRIFFIN was not present at this time or when IVERY, GIL and COUNTRY made the transfer. As COUNTRY walked down the street he saw GRIFFIN and expressed a desire for more drugs. GRIFFIN responded "that's you all's business. I got nothing to do with that. Take care of your own business." (T. 744-755). Later that same evening, COUNTRY negotiated a second purchase with IVERY and GRIFFIN was not involved to any degree.

At no time did the Appellant first suggest that COUNTRY talk to BOYKIN or IVERY. The informant always approached GRIFFIN for drugs, and when told he had none COUNTRY demanded that he be introduced to someone with drugs. The introductions were not spontaneous or voluntary on the part of the Appellant and once the introductions were made, GRIFFIN affirmatively announced his lack of participation in that which had taken place.



In its' unfounded argument that one conspiracy was proven, the Appellee has again attempted to avoid the dearth of evidence linking BOYKIN, IVERY and GIL to any of the other alleged conspirators by emphasizing that which was proven as to GRIFFIN and unrelated third parties. Whether GRIFFIN had dealings with others has no bearing on his relationship with BOYKIN, IVERY and GIL absent any proof to that effect. By arguing that it can be inferred that GRIFFIN was the employer of BOYKIN, IVERY and GIL solely because GRIFFIN had dealings with other independent parties, the Appellee is starting with an inference without foundation and then relying on the same to justify the conclusion.

The authorities cited by the Appellee likewise fail to support its' position. None of the cases even came close to holding that a single conspiracy could be found from the evidence proven here. In United States v. Ricco 549 F2d 264 (2d Cir. 1977), United States v. Bynum 485 F2d 940 (2d Cir. 1973), United States v. Ortega-Alvarez 506 F2d 455 (2d Cir. 1974), United States v. Leong 536 F2d 993 (2d Cir. 1976) and United States v. Panebianco, *supra*, the single conspiracies found to exist were based on the theory that when large quantities of drugs are distributed those in the chain are presumed to know that they are part of a wide-ranging venture, the success of which depends upon the performance of many others. That theory is clearly inapplicable here. No common chain was shown. BOYKIN, IVERY and GIL were neither proven to be buying drugs from or selling drugs for the Appellant.



United States v. Armedo-Sarmiento 545 F2d 785 (2d Cir. 1976) and United States v. Hinton 543 F2d 1002 (2d Cir. 1977) are also inopposite. In those cases the evidence of extensive and continuous interaction and involvement between various individuals was found to be sufficient for the Jury to find a single conspiracy. In the case at bar, GRIFFIN introduced COUNTRY to BOYKIN and IVERY once each. No further meetings and no transfers of drugs between them were shown.

The only other conceivable grounds for arguing that one conspiracy existed here are those contained in United States v. Panebianco, *supra*, at 453, United States v. Tramunti 513 F2d 1087, 1106-7 (2d Cir. 1975) and United States v. Mallah 503 F2d 971 (2d Cir. 1974), but the outcome under these tests are also unfavorable to the Government. Panebianco, Tramunti and Mallah all held that mutual management, cooperation and sales between different organizations may demonstrate the existence of a single conspiracy. GRIFFIN's introduction of COUNTRY to BOYKIN and IVERY has no arguable similarity to the common suppliers, distributors and buyers, mutual dependence, common management or commingling of assets proven in the above cases.

Neither GRIFFIN's knowledge that BOYKIN and IVERY were selling drugs nor their association with one another is sufficient to make them co-conspirators. See United States v. Cianchetti 315 F2d 584, 588 (2d Cir. 1963); United States v. Cimino 321 F2d 509 (2d Cir. 1963); United States v. Steinberg 525 F2d 1126, 1134 (2d Cir. 1975). What is required is that one have a stake in the venture. Cianchetti, *supra*. Like the Defendant in Cianchetti, the non-comittal statements of participation made by GRIFFIN belied his involvement with BOYKIN



and IVERY. The fact that GRIFFIN introduced a buyer to a seller upon the request of the informant without controlling the sale and without receiving any compensation, by itself does not create an inference that they were conspirators. United States v. Hysohion, supra. There being no other evidence to link BOYKIN, IVERY or GIL with GRIFFIN or any of the other Defendants it cannot be said that there was sufficient evidence to permit the Jury to find the single conspiracy alleged. Therefore, the proofs established the existence of two (2) or three (3) conspiracies, none of which was the single conspiracy charged.

## VI

THE VARIANCE BETWEEN THE SINGLE CONSPIRACY  
CHARGED AND THE MULTIPLE CONSPIRACIES SHOWN  
PREJUDICED CODELL GRIFFIN'S SUBSTANTIAL  
RIGHTS AND REQUIRES REVERSAL OF HIS CONVIC-  
TIONS.

The Appellee's assertion that there was no variance because only one conspiracy was proven is not only conclusory, but is also erroneous. Argument V, supra.

Where one conspiracy is charged but the proofs show several different conspiracies in which the Defendant was not involved there is a variance. United States v. Russano 257 F2d 712 (2d Cir. 1958). The question has generally been recognized as being whether the variance affected the substantial rights of the accused. If so, reversal is required. Kotteakos v. United States 328 U.S. 750 (1946), Blumenthal v. United States 332 U.S. 539 (1947). Under the harmless error test stated in Kotteakos at 764, a conviction must be reversed unless "the



conviction is sure that the error did not influence the Jury, or had but a very slight effect." United States v. Johnson 515 F2d 730, 734 N. 11 (7th Cir. 1975). The Appellee apparently declines to recognize the above as the standard to be applied and the cases it has relied on are either legally or factually distinguishable.

United States v. Rosenwasser, supra, was not concerned with the multiple conspiracy issue. The claim there was that it was error to deny a Motion for Severance when the Defendant was implicated by evidence of other crimes admitted solely against a co-defendant. United States v. Corr 543 F2d 1042 (2d Cir. 1976) also involved a severance question. In United States v. Variano 550 F2d 1330 (2d Cir. 1977) the issue was whether the Trial Court should have dismissed a substantive count of conducting an illegal gambling business when it had dismissed a conspiracy charge for the same offense. In United States v. Sir Kue Chin 534 F2d 1032 (2d Cir. 1976) the Defendant claimed that his purchasing drugs from two (2) suppliers established two (2) conspiracies. The Second Circuit declined to find any prejudice even if a variance did exist. Since the Defendant was involved in both conspiracies proof of both was admissible under Fed. R. Crim. P. 8(A).

Unlike Sir Kue Chin, supra, GRIFFIN was not a member of the one or two conspiracies consisting of BOYKIN, IVERY and GIL. The proof of the three (3) sales on June 29, 1976 and July 14, 1976 were admitted against GRIFFIN even though they were completely independent transactions on the part of BOYKIN, IVERY and GIL. The drugs purchased on these dates constituted a majority of the drugs introduced into evidence. Other drugs that the informers and government witnesses had testified were bought and sold were not presented. The significance



of the erroneous introduction of the drugs sold on June 29, 1976 and July 14, 1976 and their application to GRIFFIN is that the Jury completely rejected other testimony of the same Government witness that was not physically corroborated by the drugs allegedly involved. The Jury responded to the uncorroborated testimony by acquitting GRIFFIN on the Counts relating to those charges. Counts III, IV, V, VI and VIII.

Further prejudice to GRIFFIN was the statements allegedly made by BOYKIN, IVERY and GIL. According to COUNTRY, BOYKIN explained that it took him so long to get the drugs he was selling because "they" were cutting it up at the mill (T. 740). The Jury was free to visualize GRIFFIN, BOYKIN's alleged "employer," supervising a virtual heroin assembly line. It is this type of prejudicial and inflammatory statements that may influence a Jury's judgment. The Appellee is incorrect in its claim that this Circuit has rejected the rule that only declarations made in furtherance of the conspiracy charged in the Indictment may be admitted under the co-conspirator exception to the hearsay rule. United States v. Alsondo 486 F2d 1339, 1346 (2d Cir. 1973), United States v. Olweiss 138 F2d 798, 800 (2d Cir. 1943) and United States v. Marchisio 344 F2d 653 (2d Cir. 1965) stand only for the proposition that even in the absence of a conspiracy charge out of court declarations of one Defendant may be admitted against another where a joint venture or common plan is shown by the evidence. The Appellant's contention that the co-conspirator exception applies only to statements made in furtherance of the conspiracy charged in the Indictment accurately states the law on this subject. See, United States v. Ragland 375 F2d 471, 476-477 (2d Cir. 1967); Paoli v. United States 352 U.S.



232, 237 (1957); United States v. Rodriguez 509 F2d 1343, 1346-1357 (5th Cir. 1975). In any event, Alsondo, supra, Olweiss, supra, and Marchisio, supra, are inapplicable for the reason that no concert of action or confederation was shown to exist between BOYKIN, IVERY and GIL and any of the other Defendants.

The evidence in the case at bar failed to show the single conspiracy charged and none of the conspiracies proven was that alleged. The number of conspiracies proven is not the controlling factor in determining whether the variance was prejudicial. A variance involving two (2) conspiracies may be sufficiently prejudicial to require reversal, United States v. Russano, supra, at 715-716, and the Supreme Court's analysis of the prejudice question in Kotteakos, supra, and Blumenthal, supra, prevents an interpretation that every two (2) conspiracy variance is harmless error. United States v. Johnson, supra, at 735.

Since more than one conspiracy was proven the failure to instruct that evidence relating to those separate conspiracies was not admissible against GRIFFIN is plain error, and in the absence of such an instruction it cannot possibly be said that under the harmless error test of KOTTEAKOS, the verdict on the conspiracy Count was unaffected by the evidence. Johnson, supra, at 733-734. Under the instructions given, the Jury could consider the actions of BOYKIN, IVERY and GIL, their statements, and the drugs they sold as evidence of the single conspiracy charged and of Appellant's guilt. This evidence unquestionably increased the likelihood that the Jury would convict GRIFFIN on the conspiracy charge, and thus the variance was prejudicial. The remaining testimony of the Government witnesses was uncorroborated. That it was



not highly incriminating evidence implicating GRIFFIN is shown by the fact that the Jury rejected much of it by acquitting GRIFFIN and others on the charges to which that uncorroborated testimony related. It cannot be said that the erroneously admitted evidence and testimony relating to BOYKIN, IVERY and GIL had no influence on the conspiracy verdict, and, accordingly, the conviction should be reversed. Kotteakos at 764; Johnson at 734 N. 11.

## VII

### THE INSTRUCTIONS ON CONSPIRACY WERE ERRONEOUS AND EXTREMELY PREJUDICIAL.

At no time did the charge to the Jury even approach a multiple conspiracy instruction. Appellant contends that the failure to do so demands reversal of his convictions.

- (A) IT WAS PLAIN ERROR FOR THE COURT TO FAIL TO INSTRUCT THAT THE JUNE 29, 1976 AND JULY 14, 1976 TRANSACTIONS BETWEEN COUNTRY, MONK, KENNY, and GIL COULD NOT BE CONSIDERED EITHER AS PROOF OF THE CONSPIRACY CHARGED OR AS EVIDENCE OF CODELL GRIFFIN'S INVOLVEMENT IN THAT CONSPIRACY.

At least two (2) or three (3) separate conspiracies were proven in the case at bar, none of which was the conspiracy charged. The instructions given did not discuss this issue but permitted the Jury to find a single conspiracy where, as a matter of law, one was not proven.

...Where, at the close of the testimony, it is clear, as here, that a Jury could not find a single conspiracy as a matter of law, the Defendant is not only entitled to a multiple conspiracy instruction, but also to an instruction that evi-



dence relating to the other conspiracy or conspiracies disclosed may not be used against him under any circumstances. United States v. Johnson, supra, at 733-734 N.10 (Citations omitted).

The failure to give such an instruction here was plain error under Fed. R. Crim. P 52(b). According to the harmless error test advanced in Kotteakos v. United States, supra, at 764, in the absence of such multiple conspiracy instructions, a Court cannot possibly be certain that the Jury's verdict on the conspiracy count was unaffected by that evidence and the conviction must be reversed. Johnson at 734. See also, Kotteakos at 769-771.

(B) THE INSTRUCTIONS ON SINGLE VERSUS MULTIPLE CONSPIRACIES WERE INADEQUATE IN THAT THEY WERE INCOMPLETE, CONFUSING AND UNCLEAR.

The Appellee is of the opinion that GRIFFIN is foreclosed from raising this argument, however, the cases cited do not support this premise. United States v. Braunig 553 F2d 777, 780 (2d Cir. 1977) held that a party who shifts his position and advances a different argument on appeal than that raised below waives the issue. United States v. Rollins 522 F2d 160, 165 (2d Cir. 1975) repeated the general rule that a search and seizure claim not raised before trial is waived. United States v. Alessi 544 F2d 1139, 1143 (2d Cir. 1976) discussed whether the Court would hear an appeal from the denial of a Motion to dismiss the Indictment.

No case raised by Appellee states that an Appellant who did not object to the trial court's failure to give multiple conspiracy instructions is absolutely barred from raising that argument on appeal regard-



less of the particular facts of the case involved. In fact, the implication is to the contrary. In United States v. Head 546 F2d 6, 8 (2d Cir. 1976) the Second Circuit held that the Defendant would not be heard to object to the conspiracy instructions when he did not do so below because there was no showing of prejudice resulting from the asserted multiplicity. The facts here are to the contrary. Prejudice did result. See Argument VI, supra.

GRIFFIN also contends that the Trial Court erred by not instructing the Jury that he must be acquitted if the conspiracy charged was not proven even if different conspiracies were shown (Appellant's Br. at 54-55). See, United States v. Calabro, supra. This contention was recently reaffirmed in United States v. Lam Lek Chong 544 F2d 58 (2d Cir. 1976), where the Second Circuit stated that a Defendant is not entitled to a charge requiring acquittal where one of the conspiracies proven is the one charged in the Indictment. Lam Lek Chong at 68. In the instant case, none of the conspiracies proven was that charged.

Neither did the facts here present a "relatively uncomplicated case" like that shown in Lam Lek Chong. The evidence covered incidents from 1967 to 1976 and related the activities of innumerable individuals with varying degrees of participation. Under the particular facts of this case, multiple conspiracy instructions, such as those given in United States v. Tramunti, supra, would have been more than helpful and, in fact, were essential.

The Second Circuit has encouraged the marshalling of proofs in complicated conspiracy cases in order to highlight differences between



Defendants, United States v. Sisca 503 F2d 1337, 1345 (2d Cir. 1974), United States v. Kelly 349 F2d 720, 757 (2d Cir. 1965), and the failure to do so here, in addition to the complete absence of instructions on multiple conspiracies and on the duty to acquit, when considered accumulatively, must be found to constitute plain error under Fed. R. Crim. P. 52(b).

(C) IT WAS ERROR TO FAIL TO INSTRUCT THE JURY THAT THE EVIDENCE ON THE APPELLANT'S ACTIVITIES FROM 1967 THROUGH 1969 COULD NOT BE CONSIDERED AS PROOF OF THE CONSPIRACY CHARGED OR AS PROOF OF THE APPELLANT'S PARTICIPATION IN THAT CONSPIRACY.

Appellant adopts and affirms this portion of his Opening Brief and contends that all the errors alleged must be considered together when determining the sufficiency of the instructions.

In addition to reversing the conspiracy conviction, GRIFFIN should also be retried on the substantive counts. Since the instructions were not proper, it was not only possible for the Jury to find that all the Defendants were parties to a single plan, design or scheme where none was shown by the proof, but when considering the substantive counts it was also possible for them to impute to the Defendant the acts and statements of others without reference to whether they related to one of the schemes proven or another. Kotteakos, supra, at 771, Schaffer v. United States 362 U.S. 511. 522-524 (1960).

#### VIII

IT WAS REVERSIBLE ERROR FOR THE COURT TO HAVE DENIED THE MOTION FOR ACQUITTAL ON COUNT II AND TO HAVE SUBMITTED THE EVIDENCE OF THAT COUNT TO THE JURY.



- (A) CODELL GRIFFIN WAS NOT SHOWN TO HAVE  
OCCUPIED A POSITION OF ORGANIZER, A SUPER-  
VISORY POSITION, OR ANY OTHER POSITION OF  
MANAGEMENT OVER FIVE (5) OR MORE PERSONS.

It is apparently Appellee's position that the persons proven to be GRIFFIN's employees within the meaning of Title 21 U.S.C. Section 848(b)(2)(A) were WILLIE GRIFFIN, JEROME HATTON, LEROY SULLIVAN, KENNETH IVERY, THOMAS BOYKIN, ROBERT BURNSIDE and JOHN BRYANT (Appellee Br. at 36). Assuming that Appellee is conceding that the other individuals named at trial were not GRIFFIN's employees, for Appellant cannot contest those facts not argued by Appellee, GRIFFIN contends that he was not proven to be the organizer, supervisor or manager of these people with respect to a continuing narcotics trafficking operation.

Appellant is unable to find any substantial reference to JEROME HATTON in the transcript of the trial proceedings and the Appellee has neglected to relate the pertinent transcript pages. HATTON's trial was severed and the Court directed a Judgment of Acquittal on Count X, the only substantive Count relating to HATTON, which alleged that HATTON and GRIFFIN distributed drugs (T. 2452-2454). The Appellant's only dealings with IVERY and BOYKIN were their introductions to COUNTRY, and for the reasons stated in Arguments II and V, supra, the proofs were insufficient to establish the relationship required under 21 U.S.C. §848. Taking the evidence in the light most favorable to the Government, ROBERT BURNSIDE (RICO) and JOHN BRYANT (GYPSY) were shown to have done nothing more than receive drugs from BILL GRIFFIN (BILL) or LEROY SULLIVAN (ROY) and pay money in return. BURNSIDES and BRYANT were free to operate as they wished without any



control or supervision from Appellant or anyone else. BURNSIDES and BRYANT could sell drugs to anyone they wished at any price and they controlled the terms of the payment and delivery. While BURNSIDES and BRYANT could arguably be said to be conspirators in that they obtained drugs from a supplier they knew to have the same relationship with others, they cannot be said to be employees within the more restrictive terms of 21 U.S.C. §848. At best, they were shown to be independent entrepreneur in a loose knit organization involving many unrelated individuals, but by no means was GRIFFIN proven to be their manager or supervisor. If that was the case, 21 U.S.C. §848 could apply to every distant purchaser at the end of a drug distribution chain regardless of whether the supplier knew of their existence, and the statute was not intended to have that broad of an application according to the facts of the cases that have interpreted it.

Of the seven (7) individuals alleged by the Appellee to be employees of GRIFFIN, the evidence established that at most only two (2) fell within that category, BILL GRIFFIN and LEROY SULLIVAN. Since Appellant was not shown to have occupied a managerial or supervisory position over five (5) others, the Trial Court erred in denying GRIFFIN's Motion for acquittal.

(B) BECAUSE THE MOTION FOR ACQUITTAL ON  
ON COUNT II WAS IMPROPERLY DENIED, THE  
JURY WAS ALLOWED TO CONSIDER PREJUDICIAL  
EVIDENCE THAT WAS IRRELEVANT TO THE  
REMAINING CHARGES

Because Appellant was not shown to be the manager or supervisor of



five (5) or more people in a continuing narcotics operation, evidence of his assets as well as the purchases of his wife not only was irrelevant to the remaining charges but was extremely prejudicial. A showing that GRIFFIN obtained substantial income was not material to any other charge. The inference that his wealth was conclusive evidence of drug dealing was not only highly speculative in that no direct connection between the two (2) was proven, but it forced the Appellant to attempt to prove that the money came from another illegal activity, gambling, which exposed the Jury to evidence of other crimes. A Directed Verdict of Acquittal should have been granted and the Jury should have been instructed to disregard all evidence relating to that charge. The inferences left for the Jury to draw from that evidence undoubtedly contributed to convictions on the remaining charges on an impermissible basis. See generally, United States v. Bass 535 F2d 110, 115 N. 7 (D.C. Cir. 1976); Davis v. United States 409 F2d 453 (D.C. Cir. 1969); United States v. Mullings 364 F2d 173, 175-176 (2d Cir. 1966); United States v. Turner 485 F2d 976 (D.C. Cir. 1973); United States v. Washington 463 F2d 904 (D.C. Cir. 1972).

Regardless of whether it was error to deny the Motion for Acquittal on Count II, the evidence relating to the purchases by MS. GRIFFIN was not probative or relevant to the issue of Appellant's income. That MS. GRIFFIN may have been receiving welfare payments can hardly be said to lead to the inescapable conclusion that she received money from no source other than GRIFFIN. Without any proof to the



contrary, it is just as likely that MS. GRIFFIN had an independent source of income and lied in the welfare application. It was only to avoid exposing the Jury to this evidence of welfare fraud that GRIFFIN entered into the stipulation in question.

IX

THE CAUSE MUST BE REMANDED FOR RE-SENTENCING.

- (A) IN THE EVENT ANY OF CODELL GRIFFIN'S CON-  
VICTIONS ARE REVERSED, RESENTENCING IS  
CALLED FOR.

The Appellant received four (4) concurrent sentences and all of the convictions should be reversed. Where an invalid conviction may have influenced the sentence imposed, the Court of Appeals should vacate the sentences and remand for resentencing of the valid counts without consideration of the invalid ones. McGee v. United States 562 F2d 243, 246 (2d Cir. 1972); United States v. Sperling 506 F2d 1323, 1343 (2d Cir. 1974).

- (B) IT WAS ERROR TO SENTENCE THE APPELLANT  
UPON INFORMATION PROVIDED BY THE  
GOVERNMENT WITHOUT ALLOWING HIM ADEQUATE  
TIME TO REVIEW THE SAME AND PREPARE A  
REBUTTAL.

The Appellee contends that the Court of Appeals is unable to consider Appellant's argument that his sentencing was erroneous (Appellee Br. 41-42). This is plainly a misstatement of the law. Appellate Courts do have the power to hear a claim that a sentence is the product of procedures inconsistent with due process, United States v. Malcolm 432 F2d 809, 815 (2d Cir. 1970), or that it was based upon erroneous criteria. United States v. Wiley 278 F2d 500 (1960).



A court's failure to take appropriate steps to ensure the fairness and accuracy of the sentencing process must be held to be plain error and an abuse...of discretion. United States v. Robin 545 F2d 775, 779 (2d Cir. 1976).

...while...Appellate Courts lack the power to review the length of a sentence imposed within statutory limitations "careful scrutiny of the judicial process by which the particular punishment was determined...is a necessary incident of what has always been appropriate appellate review of criminal cases. United States v. Bass, supra, at 118.

CODELL GRIFFIN contends not only that it was error to deny him an opportunity to rebut information presented by the Government and relied on by the Court, but also that it was improper for the Court to base the sentence imposed on that information, Argument IX(c), infra.

The Appellee states that the documents and information in question were not prejudicial because it was requested by the Court and related only to sentences imposed upon similarly situated Defendants in other cases. Trial counsel had no opportunity to examine this information and Appellate counsel has never seen these documents. Whether the information was actually requested by the Court is unknown, but Appellant is not satisfied with the Appellee's representation that it dealt with similarly situated defendants.

United States v. Alexander 498 F2d 934 (2d Cir. 1974), cited by the Appellee, is inapplicable here. In Alexander, the Trial Court's refusal to disclose a Pre-sentence Report was held not to be an abuse of discretion under the rules then in existence because there was nothing improper in the report which affected the sentence. Here, in accordance with the Prosecutor's encouragement, JUDGE KNAPP reviewed



sentences imposed in other cases and admitted that it influenced the sentence imposed. Other than the Appellee's self-serving statements, there is nothing to indicate that the information at issue related to sentences imposed on "similarly situated defendants." This is the nub of the problem here. If Appellant was to be sentenced on the basis of sentences imposed on other "similarly situated Defendants," he should at least have been given the chance to determine whether these other offenders actually were "similarly situated." If not, GRIFFIN was entitled to the opportunity to point out the differences between the cases and to demonstrate to the Court why he should be treated less harshly. Defendants have the right to argue for mitigation of punishment, United States v. Rosner 485 F2d 1213, 1230 (2d Cir. 1973), and to rebut the information "relied on by the sentencing Judge. United States v. Read 534 F2d 858 (9th Cir. 1976). It is difficult to visualize how this is possible when, as here, a Defendant is not given adequate access to the information influencing his sentence. CODELL GRIFFIN was effectively denied a viable sentencing procedure. Accordingly, the prejudice here is indistinguishable from that in United States v. Robin, supra, or United States v. Rosner, supra.

To enable a defendant to effectively present his version of the facts to the court...we have held that a defendant must be given adequate time to prepare and present a rebuttal to information which he contests. Robin, supra, at 780.

(C) THE DISTRICT JUDGE ABUSED HIS DISCRETION BY IMPOSING SENTENCE PURSUANT TO SENTENCES IMPOSED IN OTHER UNRELATED CASES WITH THE PURPOSE OF DETERRING THE GENERAL PUBLIC RATHER THAN CONSIDERING APPELLANT'S CASE INDIVIDUALLY.



While general deterrence may be a proper factor in sentencing, it should not be the controlling factor. The modern philosophy of penology is to have the punishment fit the individual rather than the crime. Williams v. New York 337 U.S. 241, 246 (1949). The Trial Court here relied on the sentences imposed in unrelated cases and considered public deterrence as the controlling factor in fixing sentence.

I am faced with what my sentence says to the community about the conduct which you have been engaged in and that, it seems to me, has to be paramount in this situation. In the light of that I can't see giving you less than I am going to give you. (Emphasis Added) (sentencing transcript at 33-34)

Not only does sentencing on the basis of other cases run contrary to the theory of individual sentencing approved in Greg v. United States 394 U.S. 489, 492 (1969), but it together with giving general deterrence paramount consideration also constitute a type of "fixed and mechanical" approach to sentencing disapproved in United States v. Schwarz 500 F2d 1350 (2d Cir. 1974) and United States v. Baker 487 F2d 360 (2d Cir. 1973).

Unlike United States v. Seijo 537 F2d 694 (2d Cir. 1976), the reasons justifying sentence given by JUDGE KNAPP did include improper criteria. Since the sentence must be vacated the Trial Court must redo the entire sentencing process. McGee v. United States, supra, at 246.

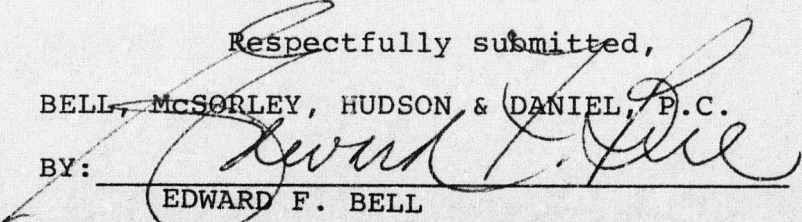
#### CONCLUSION

For the reasons stated above, the convictions should be reversed.

Respectfully submitted,

BELL, MCSORLEY, HUDSON & DANIEL, P.C.

BY:

  
EDWARD F. BELL

ON THE BRIEF: RONALD A. MOLTER



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 77-1171

UNITED STATES OF AMERICA,  
Plaintiff-Appellee

-vs-

CODELL GRIFFIN,  
Defendant-Appellant

PROOF OF SERVICE

STATE OF MICHIGAN) SS  
COUNTY OF WAYNE )

MAQUETTAS HARRIS, being first duly sworn deposes and says that she is employed by the law firm of BELL, MCSORLEY, HUDSON & DANIEL, P.C., Attorneys for Defendant-Appellant in the above entitled matter, and that on the 22<sup>nd</sup> Day of July, 1977, she served true copies of Reply Brief for Appellant, upon counsel for Plaintiff-Appellee, RONALD GARNETT, ESQ., U.S. Attorneys Office, S.D.N.Y., U.S. Court-house Annex, 1 St. Andrews Plaza, New York, New York, 10007, by enclosing same in an envelope, addressed as aforementioned and sent by Federal Express with postage fully prepaid thereon.

*Maquettas Harris*  
MAQUETTAS HARRIS

Subscribed and Sworn to before  
me this 22<sup>nd</sup> Day of July, 1977

*Annabelle Feggins*  
ANNABELLE FEGGINS, Notary Public  
Oakland County, Michigan  
(Acting in Wayne County, Michigan)  
MY COMMISSION EXPIRES: June 30, 1979

